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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974 No.

ROBERT E. BUTCHER and
GLADYS K. BUTCHER

Plaintiffs and Appellants,

vs.

BURTON ABSTRACT AND TITLE COMPANY,
a Michigan corporation,

Defendant and Appellee

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

ROBERT E. BUTCHER and GLADYS K. BUTCHER, Petitioners herein, petition this Honorable Court for a writ of certiorari to review the order of the Michigan Supreme Court denying Petitioners' application for leave to appeal the judgment of the Michigan Court of Appeals rendered in this matter, and respectfully show:

OPINIONS IN COURTS BELOW

1. The Michigan Supreme Court, in denying leave to appeal, issued no formal opinion. 392 Mich. 767

2. The decision of the Michigan Court of Appeals in the instant case is reported in 52 Mich App 98 (1974).

3. The opinion of the Trial Court, Wayne County Circuit Court, is not a reported opinion.

The opinions of the Michigan Court of Appeals and the Trial Court, and the order of the Michigan Supreme Court denying leave to appeal are appended hereto.

JURISDICTION OF THIS COURT

The order sought to be reviewed was dated and entered on June 27, 1974, by the Supreme Court for the State of Michigan. It refused Petitioners' application for leave to appeal the judgment of the State Court of Appeals dated March 7, 1974. It is believed that 28 USCA 1257(3) confers jurisdiction on this Court to review the action of the Supreme Court by writ of certiorari.

The Plaintiffs contend that the action of the Michigan Courts in establishing a new criterion for determining whether money charges against real property created by statute or ordinance constitute encumbrances, after the date of the title insurance contract between Plaintiffs and Defendant, which prevented recovery in the Michigan Courts on their claim of encumbrance and for legal expenses had the legal effect of the State of Michigan

denying to Plaintiffs the equal protection of the laws, depriving them of their property without due process of law, and impairing the obligation of their contract. Prior to the date of the opinion by the Trial Court in this case, the common law of the State of Michigan as interpreted by numerous decisions of the Courts was to the effect that Michigan did not follow the "general rule" that a special assessment does not become an encumbrance until it has achieved lien status (assuming that is the general rule). The Michigan Courts have now decided to apply that rule to cases involving money charges created by statute or ordinance, the purpose of which is to pay public debts. Plaintiffs' claims for damages based upon encumbrances on the property and litigation expenses provided for by contract were denied because the encumbrances had not attained lien status. No change in the law of encumbrances was announced by the Court as to other types of encumbrances so that the old rule, which is not the "general" rule, will apply in Michigan as to all other forms of encumbrance and claims of encumbrance will be enforced regardless of whether those other encumbrances have attained lien status. No rationale for this new discrimination is advanced or suggested by the Michigan Courts.

Decisions of this Court holding that the actions of State Courts and of judicial officers in their official capacities are to be regarded as actions of the State within the 14th Amendment are:

Shelley v Kraemer, 334 US 1, 68 S Ct 836, 92 L Ed 1161 (1948)

Robinson v Florida, 378 US 153, 156, 84 S Ct 1693, 12 L Ed 2d 771 (1964)

Moose Lodge No. 107 v Irvis, 407 US 163, 92 S Ct 1965 (1972) 32 L Ed 2d 627

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Strauder v West Virginia, (1880) 100 U S 303, 25 L Ed 664

See also Gilmore v City of Montgomery, 94 S Ct 2416, 2424 (1974)

That the denial of equal protection of the laws is a fortiori, a denial of due process, see the analysis of Mr. Justice Stone concurring in Hague v CIO, 307 US 496, 518 ff; 59 S Ct 954; 83 L Ed 2d 1423 (1938).

Early decisions of this Court to the effect that contracts could not be impaired by judicial construction are:

J.W. Perry Co. v Norfolk, Va. (1911) 31 S Ct 465, 220 US 472, 55 L Ed 548

Douglass v Pike County, Mo. (1879) 101 US 677, 11 Otto 566, 25 L Ed 968

While we recognize that later cases of the Court seem to confine the application of the contracts clause to subsequently passed legislation, we would ask the Court to consider that the effect of the Michigan Courts' decision is there has been a change in the common law of the State of Michigan

and we should think that if the Court has jurisdiction under the contracts clause to review a subsequent change in the statute law or the State Constitution when in fact a change has been made, the Court should also have jurisdiction under that clause to review a holding to the effect there has been such a change when in fact there has not been such a change.

QUESTIONS PRESENTED FOR REVIEW

CAN THE STATE OF MICHIGAN, THROUGH ACTION OF ITS COURTS, DECLINE TO ENFORCE CLAIMS BASED UPON ENCUMBRANCE ARISING OUT OF MONEY CHARGES UPON PROPERTY UNTIL SUCH TIME AS THE STATE DECLARES SUCH CHARGES TO BE LIENS, WHILE CONTINUING TO ENFORCE CLAIMS BASED UPON OTHER TYPES OF ENCUMBRANCES NOT DECLARED TO BE LIENS, WITHOUT VIOLATING THE EQUAL PROTECTION AND THE DUE PROCESS CLAUSES OF THE 14TH AMENDMENT AND/OR THE CONTRACTS CLAUSE OF SECTION 1 OF ARTICLE X?

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

The case involves a claim under the due process and equal protection clauses of Section 1 of the 14th Amendment to the United States Constitution and the contracts clause of Section 1 of Article X of the United States Constitution. Various provisions of the Michigan Constitution of 1963, Michigan Compiled Laws Annotated, and Ordinances of the Township of Grosse Ile are also incidentally involved. Because of their length, the pertinent text is set forth in the Appendix.

Michigan constitutional sections involved are Section 7 of Article III, relating to the continuation in force of the common law of the State of Michigan, and Sections 1, 3, 6 and 15 of Article IX, all of which deal with the power of the State to levy property taxes. The statutory provisions are MCLA 280.474; 211.36; 211.37; 137.1a; and 137.1c, all of which deal with the mandatory duties of various local officials to levy, assess and collect taxes to pay for outstanding public bonds, and 123.192, which section purported to require property owners to connect their property to an abutting public sewer. This section was declared invalid in a previous suit. The Ordinance provisions purport to require connection to a public sewer and Sections 3.1 and 3.5 pertain to connection rates.

CONCISE STATEMENT OF THE CASE

Plaintiffs purchased real property located in the Township of Grosse Ile, State of Michigan, on June 16, 1966. Defendant issued to Plaintiffs its owner's title insurance policy dated July 21, 1966, insuring Plaintiffs' title in and to such property in fee simple with certain specified exceptions. Proceedings under Chapter 20 of the Michigan Drain Code had been concluded prior to Plaintiffs' purchasing their property which resulted in the construction of a sewer in front of Plaintiffs' property, the construction of a sewage treatment plant to service the sewer, an assessment at large against the Township in the amount of 100% of the cost of constructing and operating the sewer and treatment plant, and the sale of bonds to cover the construction costs. All of the foregoing were completed prior to Plaintiffs' purchase of the property and prior to the issuance of the title insurance policy.

On June 27, 1966, more than three weeks before the title policy was issued, the Township adopted an ordinance purporting to place a charge against Plaintiffs' property in excess of $2,000 to help pay for said sewer. Section 2 of Act 151, PA Mich 1961, being MCLA 123.192, purported to place this property under an obligation to connect to the public sewer. A 1965 Township Ordinance purported to require the owner of the property to connect the facilities thereon to the public sewer. The connection expenses were to be borne by the property, under the statute, or by the owner, under the Ordinance. The connection charges are charges against the property. The provisions of the statute and the ordinances are enforceable by criminal and civil sanctions.

Additionally, the Township began levying in 1965 a special annual ad valorem tax against the property to pay the assessment installments due from the Township for the payment of the sewer bonds. Twenty-nine annual installments and tax levies, unlimited as to rate or amount, are authorized by Chapter 20 against all taxable property in the Township after June 16, 1966, Plaintiffs' property purchase date. Annual levies since 1965 have been at the rate of 2.88 mills. No land within the State of Michigan lying outside of the limits of the Township of Grosse Ile has or can have under Chapter 20 any liability or any potential liability to be taxed, specially assessed or charged for the purpose of helping to pay for this particular sewer.

Finally, the voters of the Township had authorized the issue of bonds by the Township Board of Education and the increase of the 1908 constitutional 15 mill limitation for the purpose and for periods sufficient to pay for such bonds, all of which had

occurred prior to Plaintiffs' purchase of the property and which bonds were not and are not completely paid for.

Various sections of the Michigan statutes provide generally that officials of the local community shall levy sufficient taxes annually to pay principal and interest on both the voted and the unvoted bonds: See MCLA 211.36, MCLA 211.37, MCLA 280.474, MCLA 137.1a, MCLA 137.1c. The effect of these statutes is not questioned in this lawsuit.

The Township, threatening the imposition of civil and criminal sanctions, demanded of Plaintiffs that they connect their property to this public sewer and pay the charges imposed by the Ordinance. Plaintiffs, in Wayne Circuit, Michigan, Civil Action 97018, contested the validity of Act 151, the validity of the Township Ordinance imposing the charges against Plaintiffs' property, and the validity of the provisions of Chapter 20 authorizing the levy of special taxes for thirty years to pay for the sewer without a vote of the electors.

All Michigan Courts upheld the validity of Chapter 20 authorizing unlimited property taxes for thirty years to pay for the sewers and sewer treatment plant. The Michigan Supreme Court, reversing the lower Courts, held that Plaintiffs could not be required to pay the charges imposed against their property by the Township nor could the Township require the property to be connected to the sewer in question. See Butcher v Grosse Ile Township, 387 Mich 42, 61, 63, 64 (1972). That opinion was affirmed by this Court, 93 S.Ct. 69; 405 US 814; 34 L Ed 2d 71 (1972).

Defendant, by issuance of its policy of title insurance, has insured Plaintiffs' title to the property against non-excepted "defects, liens, encumbrances, taxes, assessments . . . " and has contracted to "defend the insured in all actions or proceedings founded on a claim of title or incumbrance prior in date to this policy, . . . ". Condition 1. It is also obligated to pay Plaintiffs' costs and attorney fees incurred in this case. Condition 6.

Plaintiffs requested Defendant to either remove or satisfy the encumbrances on their property and/or to assume the burden of the litigation, since none of the foregoing items were excepted from coverage under the title insurance policy provisions. Defendant declined to do either. No material issue of fact is presented by the record, except the matter of the extent of Plaintiffs' damages. Plaintiffs brought this action to recover their damages resulting from the encumbrances on the property and from the failure of Defendant to undertake the necessary litigation to defend Plaintiffs' title which it had contracted to do.

The Circuit Court granted Defendant's motion for summary judgment, concluding:

"This Court finds that:

(1) The general ad valorem taxes as annually levied for the 1965 sewer and school bonding are not the responsibility of the title insurance company since the taxes as accrued had been paid up to the date of the issuance of title insurance policy.

(2) The charges under the June 27, 1966 Ordinance of the Township of Grosse Ile

were prospective, unmatured public charges which became a lien or encumbrance upon the property when they are due or when they progressed to the stage where they could be labeled a lien.

(3) And that the defendant is not liable for the plaintiffs' attorney fees in this action or other actions since the prior court actions did not involve a dispute concerning a claim on the title or an encumbrance or lien existing prior to the date of the issuance of the policy." See page 36a.

The Michigan Court of Appeals affirmed both the holding and the reasoning of the Circuit Court, concluding:

"Since none of the charges the plaintiffs claim as encumbrances were either due or liens at the date of the issuance of the title policy, they do not constitute liens or incumbrances within the meaning of the policy terms." See attached Opinion, page 16a.

The Michigan Constitution of 1963, which was effective January 1, 1964, provides in Section 7 of Article III;

"The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed."

Under all prior decisions of the Michigan Supreme Court and the Michigan Court of Appeals

interpreting the common law of the State of Michigan the term "encumbrance" has been defined as "anything which constitutes a burden upon the title to the diminution of the value of the land but consistent with the passage of the fee by the conveyance." No previous Michigan case involving the point has held that a money charge imposed by statute did not become an encumbrance until such time as it became a lien. All previous Michigan cases involving the point hold that it is not necessary that there be a lien in order for a money charge to constitute an encumbrance.

Thus, without benefit of a statute or a change in the Michigan Constitution which provides for a continuation in force of the common law, the Michgan lower Courts have declared that the State of Michigan will not enforce claims of encumbrance based upon statutory money charges until such time as those charges become liens or become due. They did not hold that the people or the Legislature had changed the law of encumbrance. They did not declare the property was not burdened or that its value was not diminished. They arbitrarily declared that claims based upon this particular type of encumbrance would not be enforced until such time as the annual installments were due or until they became liens. At the same time, there was no change declared by the Courts as to the enforceability of claims arising out of other types of encumbrances. Presumably, the Courts will continue to enforce claims based upon these other types of encumbrance notwithstanding the fact that they do not constitute liens.

We note parenthetically that all liens are encumbrances but that not all encumbrances are liens.

Defendant insured against "defects, liens, encumbrances, taxes, assessments . . . " and the holding of the lower Courts obliterates the word "encumbrances" from that contract, insofar as money charges are concerned.

Plaintiffs sought leave to appeal the judgments of the lower Courts in the Michigan Supreme Court. They claimed in the application for leave to appeal that Plaintiffs had been deprived of their property without due process of law in violation of the 14th Amendment and/or that the State of Michigan had impaired the obligation of the contract which Plaintiffs had with the Defendant by virtue of the actions of the lower Courts in violation of Article I, Section 10 of the Federal Constitution.

The constitutional issues were raised (pages 14, 15, Application for Leave to Appeal in these words:

> "An encumbrance is 'anything which constitutes a burden, . . . ' etc. There has been no other definition of the term 'encumbrance' handed down by this Court since Michigan became a State. The definition of an encumbrance which was enunciated in Post v Campau in 1879 was reaffirmed in Birmingham and Keefe and is the same definition which prevailed in this State on July 21, 1966, the policy issue date. If there is to be a change in what constitutes an encumbrance under the law of this State, then that change should be made by the legislature or, if the judiciary is going to alter its numerous holdings made consistently over the past 100 years, then the alteration should be prospective in operation only. Otherwise, the contract which Plaintiffs made with

> Defendant and similar title contracts purchased by other property purchasers will have been impaired in violation of the State Constitution, Art I, Sec 10, and the Federal Constitution, Art I, Sec 10, and our property will have been taken from us without due process of law, contrary to the provisions of the 14th Amendment to the Federal Constitution and Art I, Sec 17 of the Michigan Constitution."

The basis for these constitutional claims is that the State, through its Courts, has denied to Plaintiffs and to others similarly situated, the equal protection of the laws required by the 14th Amendment in that it has refused to enforce these certain types of encumbrances until such arbitrary time as the State might subsequently declare them to be liens or until payments become due, while it will apparently continue to enforce claims based upon other types of encumbrances regardless of whether they constitute liens. The result of this unequal treatment is that the Plaintiffs' property has been taken from them without due process of law and the obligation of the contract which they made with Defendant has been impaired.

The constitutional issues were raised in the only forum in the State of Michigan which could have authority to pass on the questions. Obviously, discriminatory actions by the Courts cannot be anticipated by a litigant and thus cannot be pleaded.

The Michigan Supreme Court, without oral argument, denied the Plaintiffs' application for leave to appeal, the effect of which is to finalize the judgment of the Courts of Appeals.

ARGUMENT

I.

A.

THE MICHIGAN COMMON LAW ON JULY 21, 1966, THE POLICY ISSUE DATE, WAS TO THE EFFECT THAT THE PROPERTY WAS ENCUMBERED ON SUCH DATE.

"An encumbrance is anything which constitutes a burden upon the title to the diminution of the value of the land but consistent with the passage of the fee by the conveyance." Porter v Ridge, 310 Mich 425 (1945). Of like effect, see Simons v Diamond Match Co., 159 Mich 241 (1909), and Post v Campau, 42 Mich 90 (1879), and cases cited therein. See also Young v Thendara, Inc., 328 Mich 42 (1950); Lavey v Graessle, 245 Mich 681 (1929); Investors Ass'n v Birmingham, 298 Mich 314 (1941), affirmed 316 US 153, 86 L E 1341, 62 SC 975; Keefe v Oakland Co. Drain Comm, 306 Mich 503, 511 (1943); affirmed 322 US 393, 88 LE 1346, 64 SC 1072; Sonenklar v Farmington Township, 25 Mich App 387, 391 (1970); Lindsay v Eastwood, 72 Mich 336 (1883). See also Westerlund v Black Bear Mining Co., 203 F Rep 599, 604, for a general discussion of encumbrances.

No other definition of the term "encumbrance" had ever been adopted by the Michigan Supreme Court or the Michigan Court of Appeals prior to March 7, 1974, the date the Court of Appeals Opinion was rendered. Neither Defendant nor the Courts claim that there had ever been any other definition of the term in this State.

Thus, to constitute an encumbrance, there must be:

(a) A burden
(b) A diminution of the value of the land
(c) No interference with the passage of the fee by the conveyance.

Plaintiffs think that the State Constitution and the State statutes provide a variety of burdens on property within the State. Various types of burdens by State action would be things such as tax laws, zoning laws, building laws, health laws, and laws providing for dower rights. The fact that the property is burdened does not in and of itself mean that the particular property is encumbered. There must be both a showing of burden and a showing of diminution of the value of the land resulting from the burden before the matter constituting the burden can also be considered to be an encumbrance.

In the following cases, all cited above, the Michigan Courts have held that a money charge imposed by governmental action constitutes an encumbrance under the common law of the State of Michigan:

In Lindsay v Eastwood, an assessment for drain taxes was held to constitute an encumbrance at the time of the assessment even though no provision was made in the statute for a lien to attach at that time;

In Sonenklar v Farmington Township, the township sewer connection charge was deemed to be an encumbrance even though the township specifically disclaimed that the charge was a special assessment or a lien;

Both Municipal Investors Ass'n v City of Birmingham and Keefe v Oakland Drain Commissioner held that the "possibility of

reassessment" of an assessment cancelled under the tax sale laws was an encumbrance even though plaintiffs in both cases (p 322, Birmingham, p 511, Oakland) claimed that no lien was involved. This Court reviewed the decisions in Birmingham and Keefe and affirmed each judgment.

Thus, in the latter three cases, neither an assessment nor a lien was involved or claimed. Yet, the Courts consistently held that these potential money charges constituted encumbrances under the common law of the State of Michigan. Under the Birmingham and Keefe holdings, if it is possible that land may be reassessed, it is encumbered. If the "possibility of reassessment" constitutes an encumbrance of property, then, we submit the certainty of assessment as provided in the Michigan Statutes must necessarily also constitute an encumbrance.

B.

THE STATE OF MICHIGAN, THROUGH ITS COURTS, HAS REFUSED TO ENFORCE THOSE CLAIMS OF ENCUMBRANCE BASED UPON MONEY CHARGES CREATED BY STATUTE OR ORDINANCE AND, THUS, IT HAS DENIED TO PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS, RESULTING IN AN UNCONSTITUTIONAL TAKING OF PLAINTIFFS' PROPERTY.

What the State Courts have done is to hold that there has been a valid change in the Michigan common law, when in fact there has been no valid change. The Michigan Courts say that the definition of an encumbrance now in the State of Michigan is "Anything, except a money charge imposed by statute or ordinance, which constitutes a burden upon the title to the diminution of the value of the

land but consistent with the passage of the fee by the conveyance. Money charges imposed by statute or ordinance do not become encumbrances until they become liens."

The difficulty with the Michigan Courts' decisions is that there has been no law passed by the State of Michigan through its duly constituted Legislature which comports with the Courts' holdings. In that sense, the factual situation is untypical of constitutional claims arising under Section 10 of Article I. Usually, it is the Plaintiff who claims that the State law has been passed which impairs the obligation of his contract. In this case, it is the Defendant and the State Courts who are claiming a change of law which would deprive Plaintiffs of their right to recover under the contract.

On page 3 of its Opinion, the Court of Appeals stated:

> "Granting that the broadest definition of the word 'encumbrance' might include prospective charges, the general rule is that a special assessment does not become an encumbrance until it has achieved lien status. Municipal Investors Ass'n v City of Birmingham, 298 Mich 314, 328. . . . See also Cemansky v Fitch, . . . ; and Metropolitan Life Ins Co v Union Trust Co. . . . " (p 15a).

The Trial Court in its Opinion appears to have based its decision on the same cases. (p 31a).

The citation from Birmingham referred to by the lower Courts, p 328, reads in pertinent part:

"It is the general rule that a special assessment does not become an incumbrance until it has become a lien against the premises. See 72 A.L.R. 302; Jaques v Tomb, 179 Calif. 444 (177 Pac. 280); Cemansky v Fitch, 121 Iowa 186 (96 N.W. 754); Metropolitan Life Ins. Co. v Union Trust Co., 283 N.Y. 33 (27 N.E. (2d) 225, 127 A.L.R. 370); Lindsay v Eastwood, 72 Mich 336.

In Post v Campau, 42 Mich 90, we said:

'Anything is an incumbrance which constitutes a burden upon the title; a right of way, Clark v Swift, 3 Metc. (44 Mass.) 390, 392; a condition which may work a forfeiture of the estate, Jenks v Ward, 4 Metc. (45 Mass.) 404, 412; a right to take off timber, Cathcart v Bowman, 5 Pa. 317; a right of dower, whether assigned or unassigned, Runnells v Webber, 59 Me. 488. In short, "every right to, or interest in the land, to the diminution of the value of the land, but consistent with the passage of the fee by the conveyance." Prescott v Trueman, 4 Mass. 627, 630 (3 Am. Dec. 246).'

Under the above definition of an incumbrance, it would naturally follow that the possibility of reassessment would constitute an incumbrance and thus be cancelled. Moreover, the city of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan." (Emphasis supplied)

We suggest that it is painfully obvious that the State Courts have misread their own citation from

Birmingham. The Court said in that case, and in Keefe v Oakland Drain Commissioner, that it is the general rule that a special assessment does not become an encumbrance until it has become a lien, citing cases from states wherein the general rule appears to be applied. The Court then said that the general rule is not followed in the State of Michigan. It was the holding of the Michigan Court and this Court in both Birmingham and Keefe that "the possibility of reassessment" constitutes an encumbrance under the law of the State of Michigan. It is not necessary that there be either a lien or even that there be an assessment under either of those holdings.

Now the Michigan Courts, without any statutory authority and without any change in the State Constitution, propose to apply that which they consider to be the general rule in these cases of money charges assessed by statute or ordinance provision to designated properties.

The effect of such holding is that the State deprived Plaintiffs, and others having a similar chose in action, of their property without due process of law by denying to them the equal protection of the laws because the State has refused to enforce contract rights based upon the established law of encumbrance in the cases of money charges based upon statute or ordinance, until the charges become liens, while it presumably will continue to enforce contract rights founded on other types of encumbrances without similarly requiring a finding of lien as a condition to recovery.

II.

SUBSTANTIALITY OF CASE

Article IX of the Michigan Constitution of 1963 provides in pertinent part:

"TAXES FOR STATE EXPENSES. SECTION 1. The legislature shall impose taxes sufficient with other resources to pay the expenses of state government."

"PROPERTY TAXATION; UNIFORMITY, ASSESSMENTS, CLASSES. SEC. 3. The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

"15 MILL LIMITATION. SEC. 6. Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limitations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills on each dollar of such valuation, may be

adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article II of this constitution, voting on the question.

NONAPPLICATION OF LIMITATION. The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidences of indebtedness or for the payment of assessments or contract obligations in anticipation of which bonds are issued, which taxes may be imposed without limitation as to rate or amount; or to taxes imposed for any other purpose by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law."

"LONG TERM BORROWING BY STATE. SEC. 15. The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members elected to and serving in each house, and approved by a majority of the electors voting thereon at any general election. The question submitted to the electors shall state the amount to be borrowed, the specific purpose to which the funds shall be devoted, and the method of repayment."

Under Sections 1, 3 and 6 of Article IX, a simple pattern for the exaction of taxes for State purposes is laid out. Under Section 1 the State must levy sufficient taxes to pay for State expenses. Under Section 3, all taxes must be uniform upon the classes of persons or property to whom or to which they are applied. Ad valorem property taxes must be both "uniform" and "general". This is the constitutional class.

Section 3 seems to Plaintiffs to express no more than that which is required by the State and Federal constitutional equal protection clauses. The State may levy taxes against the class provided all within the class are treated equally.

The Michigan Constitution also contains a provision whereby property taxes may be imposed other than against all members of the class. Obviously, geographical lines or the mere location of property cannot form the basis for classification of property for taxation. Hess v Mullaney, 102 F Supp 430 (1952). Under Section 6, electors who comprise less than all of the electors of the State, may consent to have their property taxed at a rate higher than the uniform general State property tax, either through the grant of temporary increased taxing authority provided in the first paragraph of Section 6 or in more permanent taxing authority granted in the charter of a local municipal corporation. Under Section 15, all of the State electors may authorize an increase in the uniform general property tax, or any other general tax, to pay for a State indebtedness or improvement.

Butcher v Grosse Ile, Supra, involved this property purchased by Plaintiffs. It was a case where an unincorporated township had levied and

was levying annual ad valorem property taxes in excess of the uniform general State property tax without a vote of the electors. Plaintiffs herein and therein argued that the increased taxes to pay for bonds violated both the provisions of Section 3, in that those taxes were neither uniform nor general, and violated the provisions of Section 6, in that tax levies exceeded 15 mills, and, because they had not been approved by the electors, were not the type of bonds referred to in the second paragraph of Section 6 authorizing unlimited taxes.

Under Plaintiffs' reading of these constitutional sections, the only event which could break the constitutional requirement in Section 3 that ad valorem property taxes be both "uniform" and "general" is the vote of the electors provided for in the first paragraph of Section 6. Obviously, property taxes can be neither uniform nor general if they are levied at a different rate in one community than in another or if the basis for the assessment varies from community to community, which explains the need for the equalization procedures contained in Section 3.

The Michigan Constitution, then, specifically provides for the imposition of local property taxes for local purposes or services which the affected people might desire and agree by vote to have provided for them, over and above the general services provided by the State. Every possibility of varying from the general 15 mill limitation is provided for in the Constitution. The general limitation itself may be raised by a vote of the general electors; the limitation may be raised temporarily by the State electors to pay for a particular indebtedness; or, any group of affected

electors, less than all of the general electors, may authorize additional property taxes for local purposes.

This Court, without oral argument, affirmed the holding of the Michigan Supreme Court in Butcher v Grosse Ile that the provisions contained in the second paragraph of Section 6 which authorize unlimited taxes to pay for bonds had the effect of cancelling out those provisions of Section 3 requiring that property taxes be levied uniformly and generally. Readily conceding our own inadequacies, Plaintiffs still do not understand how the granting by the people of the power to levy unlimited taxes to pay for bonds could in any way change or affect the requirement of uniformity and generality contained in the same Constitution. If property taxes to pay for bonds must be uniform and general but are not subject to limitation as to rate or amount, they must be levied on all taxable property within the State at the same rate, not on a portion of the property in the State. If it is proposed to levy a State-wide tax to pay for bonds, Section 15 requires a vote of the general electors.

The effect of the decision of this Court in Butcher v Grosse Ile is that under Michigan law the property which Plaintiffs purchased is subject to the levy of special ad valorem taxes without limitation as to rate or amount until the bonds in that case are paid in full. No property in the State of Michigan not lying within the Township of Grosse Ile is or can be subjected to those special tax levies.

Another, more important, effect of the Court's holding in Butcher v Grosse Ile is that the Legislature of the State apparently now has complete power

to authorize the imposition of unlimited property taxes on selected geographical areas of the State without a vote of the electors authorizing a variance from the constitutional requirement of uniformity and generality in the imposition of property taxes. As an example, the Detroit Board of Education, another unincorporated public body, had run up operating debts (as opposed to the capital improvement involved in Grosse Ile) which it claimed to be unable to pay from the proceeds of the annual ad valorem taxes and the proceeds of the State School Aid Fund. The Michigan Supreme Court, in an advisory opinion, held that if the board borrowed money with which to pay its operating debts and issued bonds in exchange therefor, it could then proceed to levy increased property taxes to pay for such bonds without a vote of the electors without violating the provisions of Section 6. See Advisory Opinion re Constitutionality of 1973 PA 1 and 2, 390 Mich 166 (1974). In the spring of this year, the Detroit Board of Education, pursuant to that opinion, issued $75,000,000 in bonds, the proceeds of which it used to pay for operating debts and which bonds are to be repaid from unlimited property taxes.

The practical effect of the two opinions is that all of the taxable property in the State is subject to the possibility of unlimited and unequal taxes to pay for selected public debts. The control which the people formerly had against this type of invidious action by the State is now gone, whether the money is borrowed for a capital improvement or to pay for a past due current operating expense. The people had local control because they could not formerly be treated unequally without their consent. A government which needs not treat its citizens equally is fundamentally a different government than one limited by the concept and requirement of equal treatment of its citizens.

This suit examines the effect of those constitutional provisions which now permit the selective placement of public burdens against specified property both upon an approving vote of the electors, as was formerly the case, and without an approving vote of the electors. Under the holding of the Michigan Courts, the purchasers of any property upon which the burden to pay for public bonds has been imposed will be deprived of their right to obtain an unencumbered title by the arbitrary, unauthorized and unequal application of the law by the Michigan Courts.

With the possible exception of mortgages, the types of encumbrances arising out of the pledging of the taxpayers' properties as security for public debts are the most numerous of any in the entire State of Michigan. As an example, every parcel of real property located in the City of Detroit which is subject to ad valorem taxes was encumbered by the action of the Board of Education in selling the unvoted bonds to pay for operating expenses and pledging to levy unlimited property taxes until such time as such bonds were repaid. No rational basis is advanced or suggested by the Court for imposing the requirement that these encumbrances mature as liens before claims based upon them will be enforced by the State of Michigan.

III.

PROPERTY SUBJECT TO SPECIAL ASSESSMENTS AND/OR SPECIAL LEVIES TO PAY FOR PUBLIC DEBTS ARE ENCUMBERED.

The basis for Plaintiffs' suit against Grosse Ile Township was that we claimed that an obligation

or debt had been created which was secured by the properties of Plaintiffs and the other Grosse Ile property owners for thirty years without our consent, without our knowledge and without a finding of special benefit to particular properties which we claimed resulted in a deprivation of property without due process of law. Of course, as to the three voted bond issues involved, there was no claim of deprivation of property without due process of law in that previous case because the matter was submitted to the affected property owners and taxes are being levied pursuant to the consent given by those property owners. The situation as to voted bonds is no different than the individual property owner giving a mortgage on his property to secure a personal debt. The electors have always had the right under Michigan law to pledge their property in support of a public debt. Now, under the decision of this Court, the State can pledge our property to the payment of public debts without our consent and it seems to us that the effect of both those pledges is to encumber the affected property.

LOCAL TAXES ARE SPECIAL TAXES, NOT GENERAL TAXES

Both the voted increased ad valorem taxes and the unvoted increased Chapter 20 ad valorem taxes approved by this Court in Butcher v Grosse Ile are taxes produced by special assessments. The assessments which raised these taxes are special assessments by definition because they are not general assessments, and the taxes produced therefrom are not general ad valorem taxes.

We make the observation that local ad valorem taxes are not general ad valorem taxes because there has been some strange thinking about the point

by the Courts which have considered the issues raised in this case and the issues raised in Butcher v Grosse Ile. Section 3 of Article IX specifically requires the Legislature to provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. No special ad valorem taxes may be levied under Section 3.

Section 6 of Article IX specifically provides for the levy of special ad valorem taxes, upon an approving vote of the qualified electors. Except for the provisions of Section 6, all ad valorem taxes must be both "uniform" and "general". Since there was no vote in the situation reviewed in Butcher v Grosse Ile, there was no apparent basis for the levy of special local ad valorem taxes in excess of the uniform general ad valorem taxes required by Section 3. The Trial Court in its opinion stated that "This Court finds that: (1) the general ad valorem taxes as annually levied for the 1965 sewer and school bonding are not the responsibility of the title insurance company . . . ". (Emphasis supplied) (p 36a).

The Court of Appeals in this case (p 15a) stated:

> "The charges claimed to be encumbrances on the plaintiffs' title can be classified as either special assessments (the connection charges and possibly the ad valorem sewer taxes) or prospective general ad valorem taxes (the school taxes and the ad valorem sewer taxes)." (Emphasis supplied)

We submit that these ad valorem taxes, both voted and unvoted, cannot be "general" ad valorem taxes as characterized by the Trial Court and the Court

of Appeals, but instead are prospective special ad valorem taxes. Plaintiffs think that whether the charges involved are characterized as special assessments for benefits to be paid in periodic installments or as special ad valorem taxes to be levied in the future, the property is encumbered because the amount of the public debt is known, the properties which are to bear the burden have been selected and the method of apportionment is fixed by statute.

It is simply impossible to come to a logical or coherent or consistent judgment if the Courts do not have the accurate facts or make inaccurate assumptions as to facts. The very reason why we say that property subject to these special levies is encumbered is because this property has been selected to bear special burdens for periods of years not borne by other properties in the State and it is thus being treated differently because it is being subjected to special taxes to pay pre-existing public debt in addition to the general and uniform State annual property taxes. The whole point of this suit is that a knowledgeable buyer would not pay the same amount for a property knowing that it is subjected to a ten or twenty or thirty year special charge for debt retirement as he would pay if he knew that the property were not subject to such charge. The situation is no different than if there were an outstanding mortgage on the property or an outstanding special assessment for benefits which had not yet been paid.

CONCLUSION

Plaintiffs are citizens and residents of the State of Michigan. They pay the same State income tax wherever in the State they reside; they pay the same sales and/or use taxes wherever in the State they purchase or use a particular item; they pay the same intangibles tax wherever in the State those assets subject to the tax might be located; they pay the same gasoline tax wherever in the State they buy gasoline; they pay the same motor vehicle registration fee in whichever location their vehicle is registered; and, wherever in the State they may reside at the time of their respective deaths, the inheritance tax will be exactly the same as if he or she had lived in any other part of the State. Only because they own real property in Grosse Ile Township are they subjected to a special ad valorem tax not imposed upon their fellow citizens who do not also happen to own property in Grosse Ile Township.

Plaintiffs questioned the power of the State to take any action which could have this result in Butcher v Grosse Ile, Supra. Section 3 of Article IX imposes a constitutional mandate that the Legislature shall provide for the uniform general ad valorem taxation of real . . . property . . . , but no Defendant claimed and no Court held that the special Chapter 20 taxes were "uniform general" ad valorem taxes. Section 6 of Article IX makes the levy of special ad valorem taxes constitutionally permissible upon an affirmative vote of a majority of qualified affected electors, but there was no claim of such an affirmative vote.

Plaintiffs' complaint in that previous action was that they were being treated unequally in that as

property owners they were subjected to a property tax not imposed against the owners of the great majority of taxable properties located within the State. Our complaint in this action is that we are again being treated unequally in that the State of Michigan, through its Courts, has decided not to enforce those title insurance contracts made within the State wherein the claim arises on the basis of special tax burdens imposed by law but will apparently enforce those contracts wherein the claim of encumbrance arises out of different factual circumstances.

This Court has held that the State of Michigan can impose special property taxes based upon geographical areas without the consent of the affected property owners and without a finding of special benefit to the property without violating the equal protection and due process clauses and the rationale of that decision would appear to permit the State to impose income taxes, sales taxes, intangible taxes, inheritance taxes, etc., against as many geographical areas as the Legislature might choose to isolate for the levy of a particular tax and would further appear to permit the Congress to impose federal taxes in selected states, counties, cities and other geographical areas at will.

Since the Courts have held that these special taxes may be imposed both with and without the consent of the affected electors, the question posed in this proceeding relates to the effect of those special statutory property tax levies by the State. There is no factual dispute. The property which Plaintiffs purchased was subject by law to a thirty year Chapter 20 sewer tax to pay for an obligation of the community. It was also subject to three taxes

of varying lengths to cover obligations of the local school board. No claim has ever been raised that the property in question was not burdened by the statutes requiring the multi-year levy of special taxes against it. No claim has ever been made that a prospective purchaser would pay the same amount for this property subject to these special tax levies as he would pay if the property were not subject to those same tax levies.

Instead, despite the fact that the amount of the burden and the property subject to assessment has been legally determined, and the method of assessment, i.e., ad valorem, has been established, the State of Michigan refuses to enforce its Common Law in its Courts as to those properties subject to these particular encumbrances until such arbitrary time as the State declares them to be "liens". It will apparently continue to enforce claims relating to other types of encumbrances as before. Such action denies to Plaintiffs and others similarly affected the equal protection of the laws and deprives them of their property without due process of law.

Plaintiffs realize that they have dwelled perhaps too extensively on the holding and rationale of this Court in Butcher v Grosse Ile. We did so because we feel that that holding, as well as the holding in the present case, is erroneous. We see more involved in the two cases than a mere increase in taxes or a simple contract between ourselves and Defendant. If taxes can be imposed by the State on an ad hoc basis against any group of people or property selected by the Legislature and based upon the location of property, then we are no different in the area of taxation than we were at the time of the Revolution, for there is

no difference in principle or in effect between an absolute monarchy and an unrestrained legislature. And if the States can choose which of the laws they are to enforce, and against whom and for whose benefit, so as to affect the constitutional rights of their citizens, then the whole concept of government enunciated in the Declaration of Independence and in the Bill of Rights is completely nullified.

Respectfully Submitted,

Robert E. Butcher
Pro Se and as
Attorney for Plaintiff-
Appellant Gladys K. Butcher

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U.S. CONSTITUTION

Section 1 of 14th Amendment

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10, Article 1

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

MICHIGAN CONSTITUTION OF 1963

Section 7, Article III

> "The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended, or repealed."

Section 1, Article IX

"The legislature shall impose taxes sufficient with other resources to pay the expenses of state government."

Section 3, Article IX

"The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. The legislature may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."

Section 6, Article IX

"Except as otherwise provided in this constitution, the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. Under procedures provided by law, which shall guarantee the right of initiative, separate tax limiations for any county and for the townships and for school districts therein, the aggregate of which shall not exceed 18 mills

on each dollar of such valuation, may be adopted and thereafter altered by the vote of a majority of the qualified electors of such county voting thereon, in lieu of the limitation hereinbefore established. These limitations may be increased to an aggregate of not to exceed 50 mills on each dollar of valuation, for a period of not to exceed 20 years at any one time, if approved by a majority of the electors, qualified under Section 6 of Article II of this constitution, voting on the question.

The foregoing limitations shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidences of indebtedness or for the payment of assessments or contract obligations in anticipation of which bonds are issued, which taxes may be imposed without limitation as to rate or amount; or to taxes imposed for any other purpose by any city, village, charter county, charter township, charter authority or other authority, the tax limitations of which are provided by charter or by general law."

Section 15, Article IX

"The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members elected to and serving in each house, and approved by a majority of the electors voting thereon at any general election. The question submitted to the electors shall state the amount to be borrowed, the specific purpose to which the funds shall be devoted, and the method of repayment."

MICHIGAN COMPILED LAWS ANNOTATED

211.36 - Volume 11, page 20

"The township clerk of each township, on or before September 15 of each year, shall make and deliver to the supervisor of his township, a certified copy of all statements and certificates on file, and of all records of any vote or resolution in his office authorizing or directing moneys to be raised therein by taxation for township, school, highway, drain, and all other purposes, together with a statement of the aggregate amount thereof, and such certified copies shall, by such supervisor, be delivered to the clerk of the county on or before October 1, and the same shall by said clerk be laid before the board of supervisors at its annual meeting and filed in his office."

211.37 - Volume 11, page 23

". . . It (the Board of Supervisors) shall direct that such of the several amounts of money proposed to be raised for township, school, highway, drain and all other purposes as shall be authorized by law, be spread upon the assessment roll of the proper townships, wards and cities. Such action and direction shall be deemed final as to the levy and assessment of all such taxes, except when there is a change made in the equalization of any county by the board of state tax commissioners upon appeal in the manner provided by law."

280.474 - Volume 14, Page 333

280.474 SAME; CONTENTS, APPROVAL; CERTIFICATION TO PUBLIC CORPORATION ASSESSED; ANNUAL NOTICE; ADVANCEMENTS

Sec. 474. The special assessment roll shall contain the name of each public corporation assessed, the total estimated cost of the project, or actual cost if the same has been ascertained at the time of the preparation of the roll, the percentage apportioned to each public corporation, the amount of the assessment against each public corporation based upon the percentage of apportionment, and the amount of each installment if the assessment is divided into annual installments. After the special assessment roll has been prepared, it shall be presented to the drainage board for approval. When the roll has been approved, then a statement to that effect, signed by the chairman of the drainage board, shall be affixed to the roll setting forth the date of approval. The chairman of the drainage board shall then certify to each public corporation assessed the amount of the total assessment against it, the amount of the various installments if the assessment is divided into installments, the due date of each installment and the rate of interest upon installments from time to time unpaid. The chairman each year, at least 30 days prior to the time of the levying of taxes by each public corporation, shall notify it of the amount of the installment and interest next becoming due, but the failure to notify any public corporation shall not excuse it from making payment of the installment and interest. On or before the due date of any installment, each public corporation shall pay to the county treasurer the full amount thereof, together with interest accruing to the due date.

. . .

. . . The tax levying officials of each of the other public corporations assessed shall levy

sufficient taxes to pay assessment installments and interest as the same become due unless there has been set aside moneys sufficient therefor. . . ."

137.1a - Volume 8, Page 665

"Whenever any municipality shall have outstanding any bonds, refunding bonds, notes or certificates of indebtedness payable from taxes, it shall be the duty of every officer or official body charged with any duty in connection with the determination of the amount of taxes to be raised or with the levying of such taxes, to include in the amount of taxes levied each year:

(a) An amount such that the estimated collections therefrom will be sufficient to promptly pay when due the interest on all such obligations and that portion of the principal thereof falling due before the time of the following year's tax collection; . . ."

137.1c - Volume 8, page 669

"Whenever any municipality shall have completed the retirement of any outstanding bonds, refunding bonds, notes or certificates of indebtedness or shall have sufficient funds in the debt retirement fund to retire said obligation payable from taxes prior to the final levy of any tax voted to retire the outstanding debt, the governing body of the municipality shall certify the completed retirement of the outstanding debt or the sufficiency of funds to retire said debt to the commission. The commission, when it has satisfied itself that the

debt has been retired or that sufficient funds are available in the debt retirement fund for which any voted tax has been authorized and that there is no longer any need for the extra voted tax, shall certify the fact to the county treasurer of the county in which the municipality is located and the treasurer shall no longer be required to include the extra voted tax in any notice or statement required under section 3 of Act No. 62 of the Public Acts of 1933, as amended, being section 211.203 of the Compiled Laws of 1948. When any municipality shall have issued unlimited tax bonds, and completed the retirement of outstanding bonds, or accumulated sufficient funds in the debt retirement fund for the retirement of the bonds, the governing body of the municipality shall certify such information to the municipal finance commission. The commission when satisfied that the bonds are retired or that the debt retirement fund is of sufficient amount to retire the bonds shall certify the fact to the county treasurer of the county in which the municipality is located, and the treasurer shall no longer be required to recognize a levy for the bond issue."

123.192 - Volume 7, page 634

"In any county in this state containing more than 300,000 inhabitants any property from which sanitary sewage emanates shall be connected to an available public sanitary sewage collection facility. The connection shall be completed within 18 months after the date of occurrence of the last of the following events:

(a) Availability of the public sanitary sewage collection facility.

(b) Improvement of the property so as to become property from which sanitary sewage emanates.

(c) This act becomes effective."

GROSSE ILE ORDINANCES

Section 9, Article II - Sewer Connection Ordinance

"The owner of all houses, buildings or properties used for human occupancy, employment, recreation or other purposes situated upon property within the Township which abuts on any street, alley, right-of-way or easement in which there is now, or may be in the future, located a public sanitary sewer of the Township, is hereby required at his own expense, to install suitable toilet facilities therein, and to connect such facilities directly to the public sanitary sewer in accordance with the provisions of this ordinance, within a period not later than one year from the time that such public sanitary sewer is lawfully available to him for connection."

Section 3.1, Article III - Sewer Finance Ordinance

"The connection rates and charges for the services and benefits provided by the Sewage Disposal System shall be prescribed from time to time by the Township Board. Before any connection shall be made to any bond sewer project or a lateral township sewer, application for same shall be made in writing to the Township by the owner of the premises to be served, or by his or her authorized agent. Such application shall be made on forms

provided by the Township. The owner, user, and-or applicant for a sewer connection permit by such application impliedly agrees to abide by all rules and regulations of the Township in all due respects, but more especially with those respecting the responsibility for the payment for sewer charges. The following shall be the connection rates and charges for connecting to the Sewer Disposal System. In addition to the consumption charge or any other lawful charge or fee, and notwithstanding any other ordinance or resolution, each premises connecting directly to the bond project sewer and all types of commercial and industrial buildings or parcels of property used for other than a single family purposes, and each user or users connecting directly to the bond sewer project shall pay a direct benefit connection charge of $700.00. In addition to the direct benefit connection charge of $700.00 each premises connecting directly to the bond sewer project shall pay a readiness to serve charge of $300.00. The total amount of $1,000.00 each premises connecting directly to a bond sewer project may be paid by the premises on which a single family residential building is located on the effective date of this ordinance or over a period not exceeding ten (10) years. In the event that the owner of such premises elects to make payment over a period of ten (10) years, he shall give the Township a lien on such premises for the amount of said charge and pay 1/10th of the said charge plus interest of six (6%) percent on the unpaid balance. If such annual billings are unpaid by the following January 20 of any year, the yearly charge shall be subject to a penalty as provided by law for unpaid taxes and if said

charges remain unpaid as of the following February 28, they shall be returned delinquent, with interest and penalty added to the County Treasurer for collection in the same manner in which the Township, County and school taxes are returned delinquent. Any owner of premises may elect to prepay said amount with interest at six (6%) percent per annum on the unpaid balance at any time so long as he is not delinquent hereunder. The total amount of $700.00 direct benefit connection charge to be paid by the user or users of all types of commercial and industrial buildings or parcels of property used for other than a single family purpose connecting directly to the bond sewer project may be paid by the owner of the properties on which parcel of property, the commercial or industrial building is located on the effective date of this ordinance or over a period not exceeding seven (7) years. In the event the owner of said building or buildings elects to make payments over a period of seven (7) years, he shall give the Township a lien on such premises for the amount of said charge and pay 1/7th of said charge plus the fee required for recording the lien to the Treasurer of the Township. On the next successive December 1, and annually thereafter, the Treasurer shall bill the owner 1/7th of the said charge plus interest at 6 (6%) percent on the unpaid balance. If such annual billings are unpaid by the following January 20 of any year, the yearly charge shall be subject to a penalty as provided by law for unpaid taxes, and if said charge remains unpaid as of the following February 28, they shall be returned delinquent with interest and penalty added to the County Treasurer for collection in the same manner in

which the Township, County and school taxes are returned delinquent. Any owner of said building or buildings may elect to prepay said $700.00 direct benefit connection charge with interest at six (6%) percent per annum on the unpaid balance at any time so long as he is not delinquent hereunder."

Section 3.5, Article III - Sewer Finance Ordinance

"Section 3.5. - AVAILABILITY OF SERVICE CONNECTION RATES FOR PREMISES, USER OR USERS OF COMMERCIAL AND INDUSTRIAL BUILDINGS OR PARCELS OF PROPERTY. Each premises, user or users of commercial and industrial buildings or parcels of property except present Potawatomie Woods premises connection directly from a building sewer on private property to the public sewer connection in the public right of way shall pay an availability of service charge of $286.00. The total amount of $286.00 availability of service charge to be paid by all premises and the user or users of all types of commercial and industrial buildings or parcels of property connecting a building sewer to the public sewer connection in the public right of way shall be paid on the effective date of this ordinance."

ORDER OF MICHIGAN SUPREME COURT
(Formal Parts Omitted)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of June in the year of our Lord one thousand nine hundred and seventy-four.

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

STATE OF MICHIGAN -- ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of June in the year of our Lord one thousand nine hundred and seventy-four.

/s/ signature _____ Clerk

OPINION OF MICHIGAN COURT OF APPEALS
(Formal Parts Omitted)

BEFORE: Lesinski, C.J., Bashara and Wade VanValkenburg, JJ

LESINSKI, C.J.

The plaintiffs, Robert E. Butcher and Gladys K. Butcher, appeal from an order issued by Wayne County Circuit Judge Charles Kaufman granting defendant Burton Abstract and Title Company's motion for summary judgment. The facts precipitating this appeal are not disputed.

The plaintiffs purchased property in Grosse Ile Township on June 16, 1966. Defendant issued its owner's title insurance policy covering the property dated July 21, 1966. The terms of the policy contract insured the plaintiffs "against all loss or damage * * * which the insured shall sustain by reason of the failure or unmarketability of the title * * * excepting only such liens, incumbrances and other matters as set forth * * *, and subject to the conditions and stipulations * * * hereto annexed." The first annexed condition reads:

> "The Burton Abstract and Title Company will, at its own cost, defend the insured in all actions or proceedings founded on a claim of title or incumbrance prior in date to this policy, except as to items specifically excluded."

Plaintiffs claim that various charges not excepted by the policy instituted by the township of Grosse Ile, and attorney's fees expended in previous litigation contesting aspects of those charges, give rise to damages under the policy contract.

The charges in question placed against the property by the township of Grosse Ile include the following:

(1) annual ad valorem taxes assessed against the township of Grosse Ile by the Grosse Ile sanitary interceptor drain and treatment plant drainage district, pursuant to chapter 20 of the drain code of 1956, to pay the costs of the sewage plant (the first payment was due December 1, 1965 and had been paid by the previous owner; 29 additional assessments would be required to retire the 30-year sewer bonds),

(2) annual ad valorem taxes assessed against Grosse Ile Township to retire Grosse Ile Board of Education school bonds approved in 1955, 1958, and 1963 by the electorate, which taxes are due each December 1st;

(3) a special assessment exceeding $2,000 subjected by a township ordinance (effective June 27, 1966), passed to help pay for a sewer installed in front of plaintiffs' property in 1965, and various sewer connection charges pursuant to this ordinance.

After being informed by the township of the sewer charges on September 27, 1967, two months after the title insurance policy was issued, the plaintiffs began a suit prior to the instant litigation which contested the charges imposed by the township ordinance mentioned above and the validity of the ordinance itself as well as the validity of MCLA 123.192; MSA 5.2767(102) which required plaintiffs' to connect to the public sewer and made the property subject to charges pursuant to such connection. For the history of this prior litigation, see Butcher v. Township of Grosse Ile, 24 Mich App 389; 180 NW2d 367 (1970); 387 Mich 42; 194 NW2d 845 (1972); 405 US 814; 93 S Ct 69; 34 L Ed 2d 71 (1972). The only relevance of this prior suit to the present action is that the sewer finance ordinance was upheld, but the sewer connection requirement and charges were prohibited in the face of an adequate private sewage disposal system. Therefore, in this action, the plaintiffs do not claim that their damages include charges arising from the township finance ordinance, which they did not have to pay, but only that the defendant should have complied with their request to enter the previous action and defend their property against the alleged

encumbrances not excepted by the policy. In relation to the third charge in question mentioned above, he thus claims only attorney fees expended in the litigation over the sewer finance ordinance.

The critical question presented by these facts is whether the charges placed against plaintiffs' property by the township of Grosse Ile constitute encumbrances within the meaning of that term as used in the title insurance policy contract.

Judge Charles Kaufman decided the question adversely to the plaintiffs in a thorough, scholarly, 17-page opinion. We agree with his decision to grant the motion for summary judgment.

The charges claimed to be encumbrances on the plaintiffs' title can be classified as either special assessments (the connection charges and possibly the ad valorem sewer taxes) or prospective general ad valorem taxes (the school taxes and the ad valorem sewer taxes). The plaintiffs concede that none of the charges were due at the time the title insurance policy was issued and plaintiffs even admit in their brief that none of the charges constituted liens on the property.

Granting that the broadest definition of the word "encumbrance" might include prospective charges, the general rule is that a special assessment does not become an encumbrance until it has achieved lien status. Municipal Investors Ass'n v City of Birmingham, 298 Mich 314, 328; 299 NW 90, 95 (1941); 72 ALR 302. See also Cemansky v Fitch, 121 Iowa (96 NW 754) (1903); and Metropolitan Life Ins Co v Union Trust Co, 283 NY 33; 27 NE 2d 225 (1940). Furthermore, ad valorem taxes not yet due are not liens or encumbrances within

the meaning of a title insurance policy. In Mayer v Van Schaich, 268 NY 320; 197 NE 296 (1935), the New York Court of Appeals dealt with a situation analagous to the instant case. Property owners in the village of Scarsdale, New York were to be charged with 40 annual installments to defray the cost of a local park. After finding out about the annual assessment, the owner sued his title insurance company since its certificate did not except the annual park assessment. The Court said:

> "Title insurance operates to protect a purchaser or a mortgagee against defects in or encumbrances on a title existing at the date of such insurance. It is not prospective in its operation and has no relation to liens arising thereafter.
>
> * * *
>
> "It follows, we think, that Lawyers Title & Guarantee Company no more agreed with plaintiff to protect him than it undertook to indemnify him for taxes to be levied against the premises after delivery of its certificate of title insurance." 197 NE 296-297.

Since none of the charges the plaintiffs claim as encumbrances were either due or liens at the date of the issuance of the title insurance policy, they do not constitute liens or incumbrances within the meaning of the policy terms. The motion for summary judgment was properly granted.

Affirmed. Costs to defendants.

DECISION RE: MOTION FOR SUMMARY JUDGMENT

This matter comes before this Court on Plaintiffs' Motion for Summary Judgment pursuant to MGCR 117.2 (3). It does appear that there is no factual dispute between the respective parties. The issue is one of legal interpretation and the consequences and ramifications of the facts herein involved.

FACTS

The plaintiffs, Robert E. Butcher and Gladys K. Butcher, are residents of the Township of Grosse Ile, Wayne County, Michigan. The defendant, Burton Abstract and Title Company, is a Michigan Corporation.

In 1964, the Grosse Ile Sanitary Interceptor Drain and Treatment Plant Drainage District allocated and apportioned the costs of the construction and operation of the Drain and Treatment Plant against the Township at large by the use of a general ad valorem tax. The ad valorem tax was placed on the general tax rolls to which the first payment was due December 1, 1965.

The construction of the Drain and Treatment Plant was completed on or about May 30, 1966. During the latter part of 1965, a sewer was installed in front of the plaintiffs' future acquired property.

On June 16, 1966, the plaintiffs purchased the real property as mentioned above, located in the Township of Grosse Ile.

On June 27, 1966, the Township of Grosse Ile adopted with immediate effect, an ordinance entitled

"The Grosse Ile Sewage Disposal Facilities Finance Ordinance." The Ordinance was published on July 5, 1966.

Under the terms of the announced Ordinance the plaintiffs' property was subject to an additional assessment in the amount of $2,390.00.

On July 21, 1966, the defendant Burton Abstract and Title Company issued its owner's title insurance policy No. F722317B insuring the title of plaintiffs' property in fee simple, subject to the express terms and conditions included in the policy.

Previous to the above stated Ordinance (July 5, 1966) the voters of the Township voted favorably in 1955, 1958 and 1963 to approve the issuance of school bonds by the Township Board of Education pursuant to Section 21 of Article X of the Michigan Constitution of 1908. An annual ad valorem tax was levied against the Township of Grosse Ile to pay for the school bonds.

On September 27, 1967, the plaintiff received a written communication from the Township demanding payment of the charges placed against Plaintiffs' property pursuant to the provision of the Grosse Ile Sewage Disposal Facilities Finance Ordinance, as well as the ad valorem taxes which were imposed in 1964 by virtue of the provisions of Chapter 20 of the Drain Code of 1956.

On October 16, 1967, the plaintiff instituted suit in the Wayne County Circuit Court (No. 97019) requesting the Court to declare the July 5, 1966 Ordinance invalid and that the plaintiff was not obligated to connect their property to the public sewer facility. The plaintiff also requested the defendant

to take part in the suit. The defendant answered in the negative.

The Wayne County Circuit Court declared the Ordinance and charges therein valid and that Plaintiff must also connect their property to the sewer.

The Michigan Court of Appeals affirmed the decision of the lower court as to both determinations. (24 Mich App 389 (1970)).

Upon appeal to the Michigan Supreme Court, the Court declared the Ordinance and the charges therein valid; however it reversed the Appeals Court decision as to the requirement that a property owner must connect to an available public sanitary sewer system without a specific finding that his existing sewage system is a health hazard (387 Mich 42 (1972)).

The plaintiffs filed their complaint in this action on November 15, 1972 requesting from the defendant amounts in the form of charges expended from July 21, 1966 plus reasonable attorney fees incurred by Plaintiff in the prosecution of Wayne County Circuit Court Action 97018 and all appeals incident thereto.

ISSUES

The determinative issues before the Court are:

(1) Whether the defendant is liable for the payment of general ad valorem taxes as levied per the sewer assessment in 1964 and 1965 and the school bond issuance from the July 21, 1966 purchase date.

(2) Whether the defendant is liable for the additional assessment charges as announced by the June 27, 1966 Ordinance of the Township of Grosse Ile.

(3) And finally, whether the defendant had an obligation, based upon its certificate of title insurance, to participate in Wayne County Circuit Court Action 97018 and/or compensate the plaintiff for his costs incurred.

In essence, the defendant's liability is predicated upon a finding that the announced charges from the July 5, 1966 published Ordinance constitute a lien or encumbrance upon Plaintiffs' property on July 21, 1966.

It is Plaintiffs' position that the general ad valorem taxes levied for the payment of the sewer and school systems prior to and after the purchase date constituted a lien or encumbrance upon Plaintiffs' property. Secondly, the additional assessment as announced by the June 27, 1966 Ordinance was a present lien on that date and not subsequent thereto.

The defendant contends that the general ad valorem taxes were not due at the date of the issuance of Defendant's title insurance policy and that the charges emanating from the June 26, 1966 Ordinance did not constitute a then present enforceable lien or encumbrance on that date.

The defendant further contends that according to Sections 1, 2 (B), 5, 8 and 11 of the Conditions of the Policy issued July 21, 1966, it cannot be held liable for any prospective charges nor for any attorney fees incurred in the challenging of the Ordinance provisions and requirements.

OPINION AND DECISION

The Drain Code of 1956 contemplates two distinct types of assessments, i.e., special assessment for benefits to individual parcels of property within the drainage district and/or assessments at large against local units within the drainage district depending upon the type of drainage district and the nature of the project. OAG, 1965-1966, No. 4438, page 79 (May 19, 1965).

Our Supreme Court spoke to the question is Fluckey v City of Plymouth (1960), 358 Mich 447, 453, 454:

> "The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the person taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of of the value of property perculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecunia y loss thereby;

their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay." Doctrine stated in Cusumano v City of Detroit, 30 Mich App 603, 607, 608 (1971).

This distinction was emphasized in Re Petition of Auditor General, 226 Mich 170, where Mr. Justice Nelson Sharpe, speaking for the Court, said:

"There is a clear distinction between what are termed general taxes and special assessments. The former are burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayer. The latter are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made.

"This distinction has been followed by various attorneys general in their advice to those charged with the levying and collection of special assessments. (See Opinions of the Attorney General, November 7, 1933, p 387, March 7, 1940, April 16, 1940, March 30, 1944, p 693, and October 17, 1944, 1945-1946, p 96). See, also, Blake v Metropolitan Chain Stores, 247 Mich 73 (63 A. L. R. 1386), and School District of City of Pontiac v City of Pontiac, 262 Mich 338." (As stated in Graham v City of Saginaw, 317 Mich 427, 432 (1947)).

The Preamble of the Grosse Ile Sewage Disposal Facilities Finance Ordinance reads in part:

> "WHEREAS, in the judgment of the Township Board of the Township of Grosse Ile it is to the best interests of the Township and its citizens that all sewers and sewage disposal facilities in the Township of Grosse Ile be combined and operated in the future as a single sewer that the users and beneficiaries of said system pay uniform and reasonable rates and charges for the services furnished by said system in order to provide funds to as far as possible operate and maintain the system, and to pay for the indebtedness incurred for additions, extensions and improvements thereto, heretofore and hereafter incurred for such purposes; and
>
> "WHEREAS, the Revenue Bond Act of 1933, Section 21, M. S. A. 5.2751 and M. S. A. 11. 1430 provides authority for the Township to place sewer charges and liens on premises serviced by the Township sewage disposal system."

The Ordinance Section cited above contains characteristics of both a general tax levy and a special assessment. It is evident that the Sewer Finance Ordinance is applicable to the Township as a whole and is to be used as a means of creating a single sewer system on a public utility basis.

In addition thereto, the Ordinance expressly dictates that the Revenue Bond Act of 1933, Section 21, MSA 5.2751 and MSA 11.1430 provide authority for the Township to place sewer charges and liens

on premises serviced by the Township sewage disposal system.

A lien is defined to mean a charge or security or encumbrance upon property. Black's Law Dictionary (4th Ed Rev) p 1072; and 51 Am Jur 2d Sec 1-2, p 142, 143.

An encumbrance is defined to mean a claim, lien, charge or liability attached to and binding on real property; also accrued and unpaid taxes. Black's Law Dictionary (4th Ed. Rev) p 908.

An assessment, in the general sense, is the process of ascertaining and adjusting the shares respectively to be contributed by several persons toward a common beneficial object according to the benefit received. Black's Law Dictionary (4th Ed Rev) p 149, 150.

It is further defined to mean a determination of the share of a tax to be paid by each of many persons; or apportioning the entire tax to be levied among the different taxable persons, extablishing the proportion due from each. Iowa Natl Bank v Stewart, 214 Iowa 1229, 232 NW 445, 451.

The assessment fixes the liability of the taxpayer and ascertains the facts and furnishes the date for the proper preparation of the tax rolls. Dallas Joint Stock Land Bank of Dallas v State (Tex Civ App) 118 SW 2d 941, 942.

An assessment roll is defined as the list or roll of taxable persons and property, completed verified and deposited by the assessors, not as it appears after review and equalization. Brady v Weissenstein, 260 Mich 678.

With these definitions in mind, the Court must examine the case law.

A lien is not an essential element of the power of taxation. See Hellerstein, State and Local Taxation, pp 15-20 (1952). Unless a taxing statute expressly so provides, taxes do not constitute a lien on property. Tousey v Post, 91 Mich 631, 634; City of Gaylord v City Clerk, 378 Mich 273, 301 (1966) and 84 CJS, Taxation, § 585, p 1180.

Therefore the Court must decide whether the particular Ordinance does contain a provision for the imposition of a lien for taxes or charges due for sewage disposal service.

The applicable section of MSA 11.1430 (2), MCLA 280.430 (2) reads:

* * * *

> "(2) Charges for sewage disposal services furnished to any premises shall be a lien thereon from the date such charges are due and any charges delinquent for 6 months or more shall be certified annually to the proper tax assessing officer or agency who shall enter the same upon the next tax roll against the premises to which such services shall have been rendered, and the charges shall be collected and the lien shall be enforced in the same manner as provided for the collection of taxes assessed upon such roll and the enforcement of the lien therefor. The time and manner of certification and the other details in respect to the collection of such charges and the enforcement of such lien shall be

> prescribed by the governing body of the public corporation in which the lands are located. The payment of charges for sewage disposal services to any premises may be enforced by discontinuing either the water service or the sewage disposal service to such premises, or both."

" * * * *

The pertinent section of MSA 5.2751, MCLA 141.121 reads:

"* * * *

> "Charges for water service and sewage disposal services furnished to any premises shall be a lien thereon, and any such charges delinquent for 6 months or more shall be certified annually to the proper tax assessing officer or agency who shall enter the same upon the next tax roll against the premises to which such services shall have been rendered, and said charges shall be collected and said lien shall be enforced in the same manner as provided for the collection of taxes assessed upon such roll and the enforcement of the lien therefor. The time and manner of certification and other details in respect to the collection of such charges and the enforcement of such lien shall be prescribed by the ordinance adopted by the governing body of the public corporation . . . ."

It must be emphasized that rates authorized by MSA 5.2751 are regarded as charges for use of public improvement facilities and services, not as taxes. Metro Homes v City of Warren, 19 Mich App

664, 671 (1969) and Smith v Township of Norton, 2 Mich App 17, 23, 24 (1965).

However, in light of the service charges and the liens therein under MSA 5.2751 and MSA 11.1430 (2), the Township of Grosse Ile has also decided to use Act 253 of the Public Acts of Michigan of 1965, Section 490, (MCLA 280.490, MSA 11.1490) which provides that in lieu of or in addition to levying special assessments, the public corporation under the same conditions and for the same purposes may exact connection, readiness to serve, availability or service charges, to be paid by owners of land directly or indirectly connected with drain project or any combination thereof.

From a close reading of MCLA 280.490, MSA 11.1490 the specific legislative provision indicates and announces an annual levy to be made for the payment of the assessment at large. This condition must also be followed when the public corporation exacts a connection, readiness to serve, availability or service charges to be paid by the owners of land.

The Michigan case law is very explicit concerning the declaration of an encumbrance:

It is the general rule that anything is an encumbrance which constitutes a burden upon the title of property. Municipal Investors Assn v City of Birmingham, 298 Mich 314, 328 (1941); and Keefe v Oakland County Drain Commissioner, 306 Mich 503, 510 (1943). Hence, a special assessment does not become an encumbrance until it has become a lien against the premises. Municipal Investors Assn v City of Birmingham, supra, at

328; Post v Campau, 42 Mich 90 and Lindsay v Eastwood, 72 Mich 336 (1888).

In Lindsay v Eastwood, supra, the Drain Commissioner of Wayne County in 1884 cleaned out, deepened and widened a ditch. He ascertained the cost and expense thereof and apportioned and assessed the benefits upon the several parcels of land benefited. The amount assessed and apportioned to the defendant Eastwood's property was $80.00. The assessment was made on July 1, 1884 and was extended by the supervisor upon the general tax roll of the township for the year 1885. Approximately one year later, on September 8, 1885, the defendant sold to the plaintiff Lindsay his property by warranty deed. The defendant paid $32.00 of the $80.00 assessed to the township treasurer. The plaintiff found that $84.00 of the ditch tax remained unpaid. Plaintiff claimed that the ditch tax was an encumbrance upon the land at the time he purchased and received his deed from Defendant. Defendant claimed that the ditch tax became a lien upon the land until after the September 8, 1885 purchase date and then by virtue of the general law which makes taxes a lien from and after the first Monday of December in the year they are levied. The Supreme Court of Michigan stated very distinctly at page 338, 339 of the opinion:

> "The question presented is, when do such taxes become a lien upon the land? We are of the opinion that they become a lien as soon as they become a charge on the land, by the assessment of benefits made by the drain commissioner. The statute requires this officer to make an apportionment of the cost of construction, over and above that properly assessed upon the municipality, to the lands to be benefited

by such drain, according to the sum of the assessment of benefits on each description which shall accrue to any piece of land by reason of the construction of such drain. He is also required to assess the amount of benefits so apportioned upon the respective parcels of land, and this assessment is subject to review by the commissioner upon the request of any parties in interest. He is to make a list showing such apportionment, and serve a copy thereof upon the supervisor of the township against which any sum is assessable; and thereupon it becomes the duty of the supervisor to levy and assess the sum so apportioned against such lands as are contained in the list, and extend the same upon the general tax roll of his township.

"Under the statute, the assessment is made by the drain commissioner, and the action of the supervisor is merely ministerial, for the purpose of collection. He has no authority to change or modify such assessment, nor to review it in any manner. The duty which the supervisor performs is to levy the amount assessed by the drain commissioner upon his tax roll, and the statute further provides for the manner in which it shall be collected. The statute denominates these benefits assessed as taxes, and declares them to be a lien on the land from the time they are assessed. A mere delay of the drain commissioner to present the assessment list to the supervisor, or of the supervisor in extending it upon the tax roll, does not invalidate the lien.

> "The facts of this case show that the ditch tax in question was a lien and incumbrance upon the land sold by Defendant to Plaintiff at the time he conveyed it by warranty deed to him. The Circuit Judge held that as the tax could not be paid until it was spread upon the assessment roll in December, 1885, and the conveyance to Plaintiff was in September previous thereto, it was not a lien upon the land when the deed was made. For the reasons above stated we think the Circuit Court erred. The fact that the lien could not be discharged until after the deed was given would not determine whether the incumbrance existed or not."

The plaintiff in the instant case places great weight upon the above stated case. The facts in the above case are crucial. It appears that the assessment, the apportionment, and the evaluation were all accomplished approximately one year before the plaintiff purchased the property. Furthermore, the amount was extended on the general tax roll and Defendant had paid a percentage of the assessment.

In the instant case, a township ordinance was published 16 days before the plaintiff received his title insurance policy. In addition, the prospective charges were not due nor properly assessed on the date the plaintiff received his title policy nor were notices sent to the residents of the townships until a later date.

Both Plaintiff and Defendant cite the case of Municipal Investors Assn v City of Birmingham, 298 Mich 314 (1941):

At page 328 of the concurring opinion, the Court cites the general rule that a special assessment does not become an encumbrance until it has become a lien against the premises. The cases of Cemansky v Fitch, 121 Iowa 186 NW 754, and Metropolitan Life Ins Co v Union Trust Co, 283 NY 33, 27 NE 2d 225, are cited for precedential value.

In Cemansky v Fitch, supra, the Court stated at page 756:

> "An incumbrance is 'any right to, or interest in, land which may subsist in third persons to the diminution in value of the land, though consistent with the passing of the fee by a deed of conveyance.' But a mere possibility of establishing a right to, or interest in, land is not within this definition. The covenant against liens and incumbrances is a covenant in praesenti, and does not relate to those which may thereafter attach. If broken at all, it is broken when the conveyance is executed. Ingalis v Cook, 21 Iowa, 560; Barlow v Bank, 63 NY 399, 20 Am. Rep. 547. That an assessment may be levied and an incumbrance subsequently created by following the statutory provisions does not amount to a present incumbrance. Cadmus v Fagan, supra.
>
> "Appellee further argues that the cost was at least a claim against the property, and therefore within 'the covenant to warrant and defend the title to the said premises against the lawful claims of all persons whomsoever.' But the 'lawful claims' contemplated are those to the title conveyed,

> and not to mere charges, which may or may not be established as liens thereon. Jones on Real Property, §§ 892, 893; Merservey v Snell, 94 Iowa, 222, 62 NW 767, 58 Am. St. Rep. 391; Leddy v Enos, 6 Wash 247, 33 Pac. 508, 34 Pac. 665; Zabriskie v Baudendistel (N.J. Ch.) 20 Atl. 163."

Furthermore, in Metropolitan Life Insurance Co. v Union Trust Co., 27 NE 2d 225, 227 (1940), the Court Stated:

> "Title insurance operates to protect a purchaser or a mortgagee against defects in or incumbrance on a title existing at the date of such insurance. It is not prospective in its operation and has no relation to liens or requirements arising thereafter. Trenton Potteries Co v Title Guarantee & Trust Co, 176 NY 65, 72, 68 NE 132. * * * It follows, we think, that Lawyers Title & Guarantee Company no more agreed with Plaintiff to protect him against liability for the unpaid assessment in question than it undertook to indemnify him for taxes to be levied against the premises after delivery of its certificate of title insurance." In accord, Alexander Ramsey Estate v Merchant Trust Co of St. Paul, 217 NW 101 (1927); and Frankel v Blank, 213 NW 597, 598, 599 (1927).

The general rule in our sister states is probably more definitive of the instant problem before the Court.

Generally speaking, no lien is created until an assessment has been levied to pay the amount due on the bonds. The warranty in the deed did not include potential liens, but only liens existing at the time of delivery of the deed. Assessments unmatured or not due are not liens or incumbrances within the meaning of the law. Hobson v Beall, 279 P. 645 (1929); Hoge v Garcia (Tex Civ App) 296 SW 982; Condit v Johnson, 158 Iowa 209, 139 NW 477; Pate v Banks, 178 NC 139, 100 SE 251 and Branch v Saunders, 195 NC 176, 141 SE 583.

These bonds, as in the case of township and county bonds are not an "encumbrance" nor yet a lien; they are a "public charge" which falls upon the land in the district in rem and to be collected in the same manner as all other public charges, but do not become a lien till the maturity each year of the prescribed amount falling due. Pate v Banks. 178 NC 139, 100 SE 251, 252, 178 SE 228, 230 (1935) and Robinson v Cato, 137 NE 569, 570 (1923).

As stated in Pate v Banks, supra, at 100 SE 251, 252:

> "The lien of the charges for drainage is not a debt of the owner of the land therein, but is a charge solely upon the land and accrues, pari passu with the benefits as they shall accrue thereafter. They are not liens until they successively fall due, and are presumed to be paid out of the increased productiveness and other benefits as they accrue from time to time. These assessments are to be levied from time to time to pay, not the indebtedness of the owner of any tract, but to pay the bonded indebtedness of the district, in that they

> are exactly like bonds issued by the township, county, or state for public benefits and which become liens on property in future only to the the extent of the taxes falling due each year to pay the interest, and such part of the principal as may become due. One who purchases land in a township, county, or state cannot complain that these successive tax liens will, from time to time, be collectible out of his realty. Whether he knew of the existence of such indebtedness or not makes no difference. They are not incumbrances within the sense of the warranty clause of a deed." See also 72 ALR 303; and 59 ALR 2d 1044, 1050.

It is clear then, that where the construction of a public improvement, and the proceedings relative to the collection of the expense thereof from the land benefited, have progressed to the point where the charge for a proportionate part of the expense has become a lien upon the land subject to assessment therefor, such lien constitutes an encumbrance upon the title. 72 ALR 303 (citing the case of Lindsay v Eastwood, 72 Mich 336 (1888)).

The liability, if any, of the title insurance company upon its certificate of title insurance, is controlled by certification. Union Realty Co, Inc, et al, v Ahern, et al, 93 A2d 84, 86 (1952) and Real Estate Title Ins. Co v District of Columbia, 82 US App 170, 161 F 2d 887.

The facts in the instant case disclose that at the time of the certification of the title insurance policy (July 21, 1966), there did not exist any general ad valorem taxes due from the original sewer

bonding or the school bonding programs as issued by the Township of Grosse Ile prior to July 31, 1966. The defendant is not liable for the prospective general ad valorem taxes which are levied annually or in installments, since there were no liens or encumbrances on Plaintiffs' newly acquired property based upon the general tax rolls where said taxes appear.

As per the charges which resulted from the July 5, 1966 published date of the Grosse Ile Sewage Disposal Facilities Finance Ordinance, the Court must determine whether the assessment has progressed to the point where the charge becomes a lien or encumbrance upon the property.

The facts disclose that the property owners, generally, were not given notice nor information of the additional charge, until a few months after the publishing of the Ordinance. In addition, the notices informed the property owners of a prospective optional pay schedule which would amount to a mandatory obligation in the latter part of 1966 and early 1967. In otherwords, on July 21, 1966, property owners were not burdened with the payment of the additional charge, nor was the property burdened until the latter part of the year or early part of 1967 when a portion of the charges were due.

It must also be emphasized that the drainage department of the Township of Grosse Ile did not begin their process of assessment and levying until after the plaintiff received his title insurance policy from the defendant.

From the facts as presented, it appears that the additional assessment charge upon Plaintiffs' property constituted a prospective or potential

charge, not a lien, or encumbrance, which could attach on July 21, 1966.

Under MSA 11.1430 (2), MCLA 280.430 (2), the statute (as adopted by the present Ordinance) explicitly provides that charges for sewage disposal services furnished to any premises shall be a lien thereon from the date such charges are due.

Secondly, MSA 5.2751, MCLA 141.121, an earlier statute, as adopted by the present Ordinance, declares delinquent charges a lien.

This Court finds that:

(1) The general ad valorem taxes as annually levied for the 1965 sewer and school bonding are not the responsibility of the title insurance company since the taxes as accrued had been paid up to the date of the issuance of title insurance policy.

(2) The charges under the June 27, 1966 Ordinance of the Township of Grosse Ile were prospective, unmatured public charges which became a lien or encumbrance upon the property when they are due or when they progressed to the stage where they could be labeled a lien.

(3) And that the defendant is not liable for the plaintiffs' attorney fees in this action or other actions since the prior court actions did not involve a dispute concerning a claim on the title or an encumbrance or lien existing prior to the date of the issuance of the policy.

The plaintiffs' Motion for Summary Judgment is denied for the reasons specified in this opinion.

An order in pursuance to this opinion may be presented.

/s/ CHARLES KAUFMAN
Circuit Judge

Dated: April 13, 1973

ORDER FOR SUMMARY JUDGMENT
(Formal Parts Omitted)

At a session of said Court held in the City-County Building, City of Detroit, Wayne County, Michigan, on this 27 day of April, A.D. 1973.

PRESENT: HONORABLE CHARLES KAUFMAN
Circuit Judge

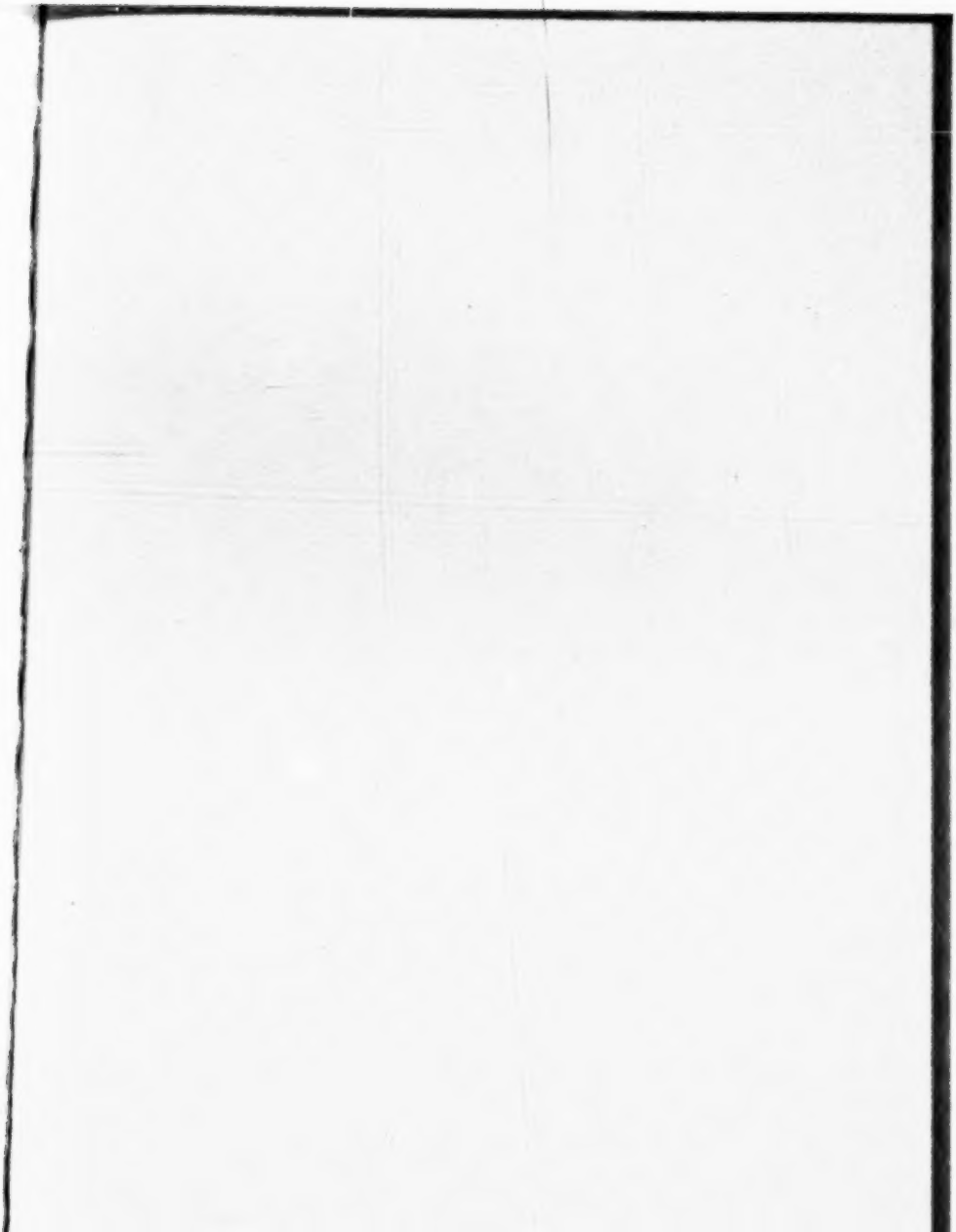
This matter having come on to be heard on Motion for Summary Judgment made by the plaintiffs pursuant to General Court Rule 117.2(3), alleging that there was no disputed issue of fact and that, except as to damages, plaintiffs were entitled to judgment against the defendant; and the defendant having answered said Motion and counsel for the respective parties having filed briefs concerning the legal issues present, and it having been agreed that there are no disputed questions of fact; and the Court having read and examined the briefs and having made extensive research of the legal authorities cited by the parties; and the Court

having thereafter rendered its Opinion as to applicable law in which Opinion he found that the plaintiffs were not entitled to judgment against the defendant but that they had no claim against the defendant under their Complaint as filed;

IT IS ORDERED that the Motion for Summary Judgment made by the plaintiffs be and the same hereby is denied.

IT IS FURTHER ORDERED, that, pursuant to the provisions of General Court Rule 117.3, Summary Judgment may be and hereby is entered in favor of the above-named defendant dismissing this action with prejudice, but without costs to either party.

CHARLES KAUFMAN
Circuit Judge



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-297

ROBERT E. BUTCHER and GLADYS K. BUTCHER,
Petitioners,

vs.

BURTON ABSTRACT AND TITLE COMPANY,
a Michigan corporation,
Respondent.

MEMORANDUM OPPOSING CERTIORARI

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a Michigan corporation,
Respondent.

MEMORANDUM OPPOSING CERTIORARI

Respondent represents to the Court as follows:

1. As was disclosed in petitioners' Brief and Appendix, this case progressed through the Michigan trial court and the Michigan Court of Appeals, both denying any relief to petitioners and without any issue or even argument being raised concerning the existence of any federal question. Upon application for leave to appeal to the Michi-

gan Supreme Court, the petitioners for the first time argued that there was a federal constitutional question involved. Setting aside for the moment the validity of that argument, the denial of their application for leave to appeal (page 12a of petitioners' Appendix) shows that the denial was because the appellants "have failed to persuade the Court that the questions presented should be reviewed by this Court." It seems apparent that the "questions presented" to be "reviewed" could not have included any federal question, since no federal question or issue had been raised in the lower courts, and no decision on that point was necessary. The best evidence of that statement is that no certificate of the Michigan Supreme Court as to the inclusion in its decision of a ruling on any federal question has been forwarded to this Court, or even requested. Nor, it is submitted, would there be any basis for a finding of that sort. The record itself shows that the issues decided under state law were on an adequate and non-federal ground, effectively preventing any state court decision to the contrary or a favorable consideration of the petition here presented (*Herb v. Pitcairn*, 324 U.S. 117).

2. It is undisputed that the action here is based upon a written contract, a title insurance policy, and on nothing else. The only issue considered by the state courts was the meaning of the clause in that insurance contract set forth in the quotation from the policy on page 13a of petitioners' Appendix, and specifically the definition of the word "encumbrance" as used there, and its applicability to petitioners' property at the time of issuance of the policy. The consideration of that issue by both Wayne County Circuit Court and the Michigan Court of Appeals is displayed at length in petitioners' Appendix. Both the original judgment and its affirmance were based solely on the meaning of those contractual provisions.

Essentially, the issue decided is expressed very well in the quotations from *Mayer v. Van Schaick*, 268 NY 320; 197 NE 296 (1935), on page 16a of petitioners' Appendix. The instant case did not turn on a question of whether the Michigan statutes provided for lawful encumbrances or liens on petitioners' property (that was decided in the previous *Butcher* litigation, cited in their brief) but whether any such encumbrances or liens existed at the time of issuance of the title policy. The Michigan courts in deciding that item uniformly held that they did not, and therefore were not covered by the terms of the policy. This case, to repeat, is strictly and completely an interpretation of a contract, and nothing more.

Petitioners' frivolous and illogical attempt to introduce into this litigation a federal question which does not and could not exist under 28 U.S.C., Section 1257, cannot confer jurisdiction upon this Court where there is none.

Therefore, the petition for certiorari should be denied, with costs awarded to this respondent.

Respectfully submitted,

REID, GILMORE & REID
By: George H. Cholack
Counsel for Respondent
714 Ford Building
Detroit, Michigan 48226

Dated: September 27, 1974.

CERTIORARI DENIED